

regulations concluded that its programs were unaffected by Adarand because individuals are not treated differently because of race and OFCCP compliance reviews do not dictate results based on race.<sup>67</sup> Instead, the contractor's own good faith efforts are the ultimate measure of compliance.<sup>68</sup>

Similarly, the Commission's EEO policy focuses completely on the licensee's good faith efforts to affirmatively recruit and retain minorities. Since the FCC's EEO program contains less intrusive requirements than OFCCP, the Commission should find, under similar analysis, that Adarand does not affect EEO. In addition, it bears notice that unlike the OFCCP contractors, the public policy rationale for EEO is especially strong because broadcast licensees must possess the necessary character requirements for being trustees of this important resource.<sup>69</sup> The EEO examination is central to the Commission's unique mission to serve the public interest. A licensee who discriminates on the basis of race cannot serve the public well because, by definition, that licensee arbitrarily excludes an element of the public.<sup>70</sup> It is reasonable to assume that a licensee who does not attempt to include all people will not attempt to include diverse viewpoints. The Commission's EEO policy, which measures licensees' best

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policies, including the granting of bonuses and "perks," its programs do not dictate results based upon race. OFCCP Notice.

<sup>67</sup> Id.

<sup>68</sup> OFCCP Notice.

<sup>69</sup> 1968 Opinion, 13 FCC 2d at 768

<sup>70</sup> Id.

efforts to include minorities in the employment process, is a minimally intrusive way to ensure licensee character and diverse broadcast programming.

Moreover, in practice, not just in theory, neither a licensee's race nor the racial composition of a station's staff dictates license renewal denials. FCC decisions to renew licenses despite relatively low representations of minorities on the staff fill the pages of the FCC Reporter. For example, the license for WSM/WSM-FM (Nashville, TN) was renewed unconditionally despite hiring only one minority out of 29 available positions, where the Nashville Metropolitan Service Area (MSA) is comprised of 15.4 percent minorities.<sup>71</sup> The Commission concluded that WSM made adequate efforts to recruit minority applicants and limit discrimination in its employment policies.<sup>72</sup> Similarly, KVCR-TV (San Bernadino, California) was renewed unconditionally although, in a 23.8 percent minority MSA, the highest point of minority representation was 8.3 percent and at times there were no minorities on staff.<sup>73</sup> Despite only one minority hire in several years in a 12.2 percent minority MSA, WPTW/WCLR-FM was renewed because of its expanded referral pool that showed affirmative efforts to include minorities in the application process.<sup>74</sup>

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<sup>71</sup> Applications of Certain Broadcast Stations Serving Communities in the States of Indiana & Tennessee, 6 FCC Rcd. 5637 (1991).

<sup>72</sup> Id.

<sup>73</sup> Applications of Certain TV Stations Serving Communities in the State of California, 6 FCC Rcd. 2340 (1991).

<sup>74</sup> Applications of Radio One, Inc., 7 FCC Rcd. 6355 (1991).

Where no individual is stripped of her individuality by the government's use of generalized racial classification, the equal protection issue evaporates and strict scrutiny does not apply. Because the FCC's EEO policy is not subject to strict scrutiny, it is unnecessary to address the issue raised by some Commenters of whether diversity is a compelling governmental interest after the recent Fifth Circuit decision in Hopwood v. Texas.<sup>75</sup>

The collection of statistical information and its use in the FCC's EEO program does not create individualized burdens on licensees or their staff. EEO is the very minimum the Commission can do to ensure that broadcast licensees do not engage in

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<sup>75</sup> Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), cert. den. July 1, 1996. See NAB, at 6-7 and Golden Orange, at 4. NOW Foundation et al. briefly clarify, however, that although the Hopwood court struck down a University of Texas Law School practice which set a lower standard of admission for Mexican-Americans and blacks as a means of achieving a diverse student body, the Supreme Court decision in Metro Broadcasting finding that "[t]he interest in enhancing broadcast diversity is, at the very least, an important governmental objective," Metro Broadcasting v. FCC, 497 U.S. 547, 567-68 (1990), remains good law.

The decision in Adarand only overturned Metro to the extent of what standard of review applies to federal race-based classifications, raising the standard from intermediate to strict scrutiny. Adarand, at 2113 ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. . . . To the extent that Metro Broadcasting is inconsistent with that holding, it is overruled."). See also Hopwood, at 944 ("[T]he Court squarely rejected intermediate scrutiny as the standard of review for racial classifications, and Metro Broadcasting is now specifically overruled to the extent that it is in conflict with this holding.") And whether or not diversity is compelling as it relates to the airways is an open question, not addressed by the courts.

Were strict scrutiny applied to the FCC's EEO program, a court would find that ensuring a multiplicity of speakers over a medium with limited voices, and promoting efforts to increase diverse employment opportunities, would be compelling governmental interests. Moreover, the FCC's efforts-based approach that does not rely on quotas or numbers is certainly narrowly tailored to achieve that goal.

racially discriminatory practices, are inclusive of and serve their communities, and have the requisite character qualifications fitting public trustees.

### **Conclusion**

Given the lack of evidence of undue administrative burdens and the importance of recordkeeping and reporting to the effectiveness of any EEO policy, NOW Foundation et al. urge the Commission to decline to make sweeping changes to its EEO policy in this notice and comment proceeding; instead we urge the Commission to conduct a negotiated rulemaking so that the broadcast industry, representatives of minority and female employees, and other interested parties can work together to craft an effective and equitable equal employment opportunity policy.

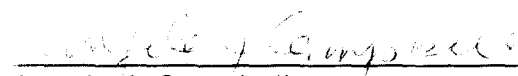
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